IN THE COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

No. 43181-5-II

FIRST-CITIZENS BANK & TRUST COMPANY, successor in interest to VENTURE BANK,

Plaintiff/Appellant,

v.

BRUCE A. REIKOW and SANDRA J. REIKOW, individually and the marital community comprised thereof,

Defendants/Respondents.

On Appeal from the Superior Court of Pierce County
Hon. Stephanie A. Arend
Superior Court Docket Number 10-2-14116-8

REPLY BRIEF OF APPELLANT

Alexander S. Kleinberg, WSBA # 34449
Chrystina R. Solum, WSBA # 41108
Joshua B. Lane, WSBA # 42192
Attorneys for Appellant

EISENHOWER CARLSON PLLC
1201 Pacific Ave., Ste. 1200
Tacoma, WA 98402
Phone: (253) 572-4500

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Table of Cases

Statutes

Court Rules

Other Authorities

I. SUMMARY OF ARGUMENT IN REPLY

The Reikows are asking this Court to affirm a judgment that is entirely based on a typographical error in a Form 1099 tax form that was sent to them approximately seven (7) months after the trustee's sale at issue and some three (3) months after FCB filed this deficiency action. This Form 1099 is legally irrelevant because this case has absolutely nothing to do with the amount of taxes paid or taxes owed. The "fair market value" of $7,820,000 that is referenced in the Form 1099 at issue has absolutely nothing to do with the actual fair value or fair market value of the commercial property at issue in this case.

It is undisputed that the Narrows Business Park was never fully tenanted or fully stabilized, and that the fair market value figure of $7,820,000 in the Form 1099 is based on a fully stabilized value. The trial court erred when it based its fair value determination entirely on the Form 1099, and the trial court also erred when it (1) disregarded the testimony of the only certified real estate appraiser to testify at trial; (2) markedly departed from the only appraisal that was admitted into evidence at trial; (3) ignored FCB's appraisal reviews, which showed the Narrows Business Park was actually worth less than the appraised as-is value; (4) ignored the fact that FCB paid approximately $133,000 in delinquent property taxes for the Narrows Business Park, which payment must be taken into account in any "fair value" determination under RCW 61.24.005(6); and (5) ignored the fact that *no one ever testified that they believed the Narrows Business Park was actually worth $7,820,000 at any point in time.*

The Reikows are asking this Court to relieve them from the promises they made in their Guaranties to absolutely and unconditionally guaranty the repayment of the $6,700,000 commercial loan that was made

to their company, NBP, LLC. There is no question that this loan would not have been made without these Guaranties. The Reikows would have this Court believe that the waivers in the Guaranties are unenforceable under the laws of the state of Washington even though the Guaranties concern a large commercial loan and plainly state the Reikows have waived all defenses that would otherwise be available to them at law or in equity and that each and every one of the waivers set forth in the Guaranties has been made with the Reikows' "full knowledge of its significance and consequences and that, under the circumstances, the waivers are reasonable and not contrary to public policy or law."

In light of the facts and circumstances of this case and applicable law, the trial court erred when it refused to enter summary judgment in favor of FCB on its deficiency claim and allowed this case to proceed to trial on the issue of fair value. The trial court also erred when it held after trial that the fair value of the Narrows Business Park was $7,820,000 on the date of the trustee's sale. This Court should reverse the trial court's rulings and remand this case to the trial court with instructions to enter a deficiency judgment in favor of FCB against the Reikows in the principal amount of $672,068.88.

II. ARGUMENT IN REPLY

A. While A Guarantor May Request A Fair Value Hearing, There Is No Right To Such A Hearing, And The Ability To Request Such A Hearing May Be Waived.

The Reikows are mistaken when they assert a guarantor of a commercial loan "has the right to a hearing to establish the fair value of

the property." [1] As seen from FCB's opening brief and RCW 61.24.100(5), the guarantor may only "*request* the court ... to determine ... the fair value of the property[.]" RCW 61.24.100(5) (emphasis added). This statute further provides the court "*may in its discretion* determine, the fair value of the property sold[.]" RCW 61.24.100(5) (emphasis added).

Obviously, this statute, which provides for the entry of a deficiency judgment against the guarantor of a commercial loan, says nothing about any "right" to a fair value hearing, nor does it state the court or other appropriate adjudicator "must" or "shall" conduct such a hearing. The reality is the court may *but need not* conduct such a hearing, which is consistent with case law concerning fair value and the setting of an "upset price" in the judicial foreclosure context. *McClure v. Delguzzi*, 53 Wn. App. 404, 767 P.2d 146 (1989) (trial court's discretion in determining whether to set a minimum bid or upset price before a judicial foreclosure sale and whether to set a fair market value after a judicial sale is abused only if no reasonable judge could have made the decision).

As seen from FCB's Brief of Appellant at pages 15-16, the trial court erred by refusing to grant FCB's motion for summary judgment in full, thereby forcing the parties to go to trial on the issue of fair value. This ruling was erroneous not just because of the waivers in the Guaranties, but also because the only appraisal before the court at the summary judgment hearing came from FCB and the Reikows did not dispute this appraisal's methods.

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[1] Brief of Respondents at 11.

As for the Reikows' reliance on RCW 61.24.005(6) in support of their position, which provides that the fair value "shall be determined by the court or other appropriate adjudicator[,]" this simply means that "fair value" cannot be decided by a jury. Even the Reikows agreed this to be the case at the opening of trial:

> THE COURT: Okay. And I thought the e-mail to us said something about a jury. Why would there be a jury in this case? If it's about fair value, it would be a bench trial.
>
> MR. KLEINBERG: That's our view, Your Honor.
>
> MR. REIKOW: There was a – when we were co-defendants, they [the Zetterbergs] had filed for a jury trial and we paid the fee for a six person jury.
>
> THE COURT: Okay. And they're out of it.
>
> MR. REIKOW: Because we were co-defendants, I felt we had the right to do the same thing.
>
> MR. KLEINBERG: I respectfully disagree. As the Court stated, this is an equitable proceeding. The fair value issue must be decided by the judge or another appropriate adjudicator...
>
> MR. REIKOW: We concur with that. We withdraw our opposition [to FCB's motion to strike the jury demand].

RP (Feb. 21, 2012) at 4-5.

In sum, there is no such thing as a right to a fair value hearing, and the guarantor's ability to request a fair value hearing can be waived.

B. The Doctrine Of Equitable Estoppel Is Inapplicable.

The Reikows contend FCB is equitably estopped from arguing they have no right to a fair value hearing. [2] Equitable estoppel requires clear, cogent, and convincing proof of three elements: (1) an admission,

[2] Brief of Respondents at 13.

statement or act inconsistent with a party's later claim; (2) action by another party in reasonable reliance on that admission, statement, or act; and (3) injury to that party when a court allows the first party to contradict or repudiate its admission, statement, or act. *Rhoades v. City of Battle Ground*, 115 Wn. App. 752, 63 P. 3d 142 (Div.2 2002) (citing *Robinson v. City of Seattle*, 119 Wn.2d 34, 82, 830 P.2d 318, *cert. denied*, 506 U.S. 1028 (1992))

While there is mention of the doctrine of estoppel in the record, the Reikows never actually briefed this argument at the trial court level, nor was this defense ever tried by the express or implied consent of the parties. FCB submits this Court should therefore not address this argument in light of RAP 2.5(a), which provides the appellate court may refuse to review any claim or error which was not raised in the trial court. Nevertheless, as seen from the following, even if the Court elects to address this argument on the merits, the argument fails for a variety of reasons.

First, the Reikows contend FCB is estopped from stating they have no right to a fair value hearing because RCW 61.24.042 provides that the statutory foreclosure notice to be sent to guarantors before the trustee's sale must state the guarantor shall have "the right" to establish the fair value of the property in a deficiency action. [3] Apparently, the Reikows are implicitly contending they relied upon the verbiage in this statutory notice. [4] The Reikows further claim they relied to their detriment on the valuation

[3] Brief of Respondents at 14; *see also* CP 14, lines 2-14.
[4] *See* Brief of Respondents at 14.

of the Narrows Business Park set forth in the Form 1099 that FCB sent to them when it came time to prepare and file their federal income tax return.[5]

There is *no actual evidence* in the record that reflects the Reikows relied on or were even aware of any *pre-trustee's sale* foreclosure notice they received that referenced a "right" to a fair value hearing under RCW 61.24.042. *See* trial transcript; *see also* CP 256-258 (findings of fact and conclusions of law). The findings of fact and conclusions of law and the testimony at trial show the Reikows' defense at trial was *entirely based* on the Form 1099 they received in January 2011, some seven (7) months after the trustee's sale and some three (3) months after FCB filed suit against them for a deficiency judgment. RP (Feb. 21, 2012) at 68, lines 21-25 ("I guess when we got that 1099 form from the bank stating the value was $7.8 million, you know, we thought it was actually true what they stated the fair market value was"); RP (Feb. 21, 2012) at 71, lines 14-15 ("I see one value, and that's what they stated on the 1099 form.") Mr. Reikow even admitted on cross-examination that he did not rely on the Form 1099 that was sent to him when it came to FCB's deficiency claim and the potential resolution of this lawsuit:

> Q. Are you able to tell me when you received this [1099] form?
>
> A. It was in January of 2011.
>
> Q. And the trustee's sale in this case was on July 9, 2010, right?

[5] Brief of Respondents at 15.

A. Correct.

Q. And this lawsuit that brings us together today was filed in October of 2010, right?

A. Yes.

Q. Okay. So is it fair to say that you received the 1099 form in the mail several months after the lawsuit was filed?

A. Yes.

Q. Okay. After you received that 1099 form, you told your attorneys about it, right?

A. Yes, I did. I gave a copy of it to Jeff Helsdon.

...

Q. As far as you know, was Mr. Helsdon ever told by anyone in our office that the bank was willing to put an end to this lawsuit because of that 1099 form that you got in the mail?

A. Excuse me?

Q. I'm wondering if, as far as you know, anyone in my office ever told Mr. Helsdon that the bank was wiling to put a stop to this lawsuit because you got this 1099 form in the mail?

A. Not that I'm aware of.

In addition, the trial transcript is completely devoid of any testimony from the Reikows regarding any damage or injury that they allegedly suffered based on their alleged reliance on the Form 1099 for tax purposes. The Reikows did not put forth at trial any documentary evidence whatsoever concerning any damages or injury they may have sustained as a result of the Form 1099 and their alleged reliance on it for tax purposes. For all the Court and FCB knows, the Reikows actually

benefited financially from the mistake in the Form 1099 by paying less in taxes to the IRS than they otherwise would have paid if the Form 1099 contained the correct fair market value of the Narrows Business Park as opposed to the incorrect fully stabilized value.

Moreover, FCB submits that a statement that is mistakenly made, such as the erroneous fair market value figure set forth in the Form 1099 at issue, cannot provide the basis for an equitable estoppel defense. Although it has extensively researched this issue, FCB is not aware of any Washington appellate case that concludes a statement that is mistakenly made can be used in support of such a defense.

The Reikows' equitable estoppel defense also fails because the Reikows have failed to show FCB made any admission, statement or act "inconsistent with a claim *later* asserted" given that the Reikows received the Form 1099 *three (3) months after* the deficiency action was filed. Similarly, the Reikows cannot show they reasonably relied on the Form 1099 insofar as it bears on FCB's right to pursue them for a deficiency judgment, as seen from Mr. Reikow's trial testimony set forth above, in which he admits he never heard anything from FCB or its attorneys concerning the termination of the deficiency action due to Mr. Reikow's receipt of the Form 1099. As such, there simply is no legitimate basis for concluding that FCB is estopped from asserting that the Reikows have no right to a fair value hearing. The reality is the Reikows failed to submit at trial evidence in support of all three elements of their equitable estoppel

defense. Further, they have not even come close to proving each and every one of these elements by the requisite clear, cogent, and convincing standard of proof.

C. The Waivers In The Guaranties Are Enforceable.

The Reikows also argue the waivers in the Guaranties are not enforceable on public policy grounds, because they are allegedly vague, and because the Reikows allegedly did not knowingly and voluntarily waive a known right. [6] The Reikows imply FCB's waiver argument was not properly made before the trial court in connection with FCB's motion for summary judgment because it was made in a reply brief, [7] which was filed in response to the Reikows' and Zetterbergs' opposition materials. The Reikows also point out that FCB did not attempt to offer evidence at trial that the Reikows knew about their claimed right to a fair value hearing at the time FCB contends they waived it. [8] As seen from the following, each of these arguments falls well short of the mark.

First, FCB's reply in support of its motion for summary judgment was filed on October 14, 2011. CP 174. The hearing on FCB's motion for summary judgment was held on January 27, 2012. RP (Jan. 27, 2012) at 3. Even if it was determined that FCB raised new issues or arguments in its reply that were not made in strict response to the Reikows' and Zetterbergs' opposition materials, and that FCB's reply should therefore be treated as a motion for summary judgment in its own right, FCB's reply

[6] Brief of Respondents at 15-18.
[7] Brief of Respondents at 7.
[8] Brief of Respondents at 18.

was nevertheless timely and proper under CR 56 because it was filed and served not later than 28 calendar days before the summary judgment hearing. Hence, there is no question that the arguments made in FCB's reply brief were properly before the trial court at the summary judgment hearing.

Second, as seen from FCB's Brief of Appellant, waivers in commercial guaranties are, in fact, enforceable under Washington law. *E.g., Fruehauf Trailer Co. of Canada Ltd. v. Chandler*, 67 Wn.2d 704, 409 P.2d 651 (1966). It appears the only published Washington appellate court decision that provides an exception to this rule concerns waivers that purportedly prevent a guarantor from challenging the commercial reasonableness of a secured creditor's disposition of collateral under UCC Article 9. *Security State Bank v. Burk*, 100 Wn. App. 94, 995 P.2d 1272 (2000). However, *Security State Bank* is different from this case because *Security State Bank* concerned the UCC while this case concerns the Deed of Trust Act, RCW 61.24. Further, the *Security State Bank* court relied upon the *express language* concerning the waiver of rights that was set forth in *two different statutes* in former UCC Article 9 (RCW 62A.9-501(3) and RCW 62A.9-504(3)) to contrast *Fruehauf* and conclude guarantors cannot waive the commercial reasonableness requirement concerning the disposition of collateral under the UCC. *Id.* at 99-100, 995 P.2d 1272. The disposition table in RCWA 62A, Articles 8 to End, page 172 reflects former RCW 62A.9-501 was repealed and replaced by four

statutes, including RCW 62A.9A-602, entitled Waiver and variance of rights and duties. The third UCC Comment to RCW 62A.9A-602 states this section revises former Section 9-501(3) by restricting the ability to waive or modify additional specified rights and duties. Thus, the holding of *Security State Bank* is based on statutes in former UCC Article 9 that expressly provided that certain rights could not be waived. In contrast, the statutory scheme at issue in this case, RCW 61.24, contains no statutes that specify that certain rights and duties can or cannot be waived. Thus, in sum, *Security State Bank* does not provide any support for the Reikows' position.

As for the Reikows' position on the waiver issue, once again, the Guaranties provide for the waiver of all defenses at law or in equity, they reflect the guarantors have agreed these waivers are not unreasonable or contrary to public policy, and, immediately above the signature lines, the Guaranties state the following in bold font and in capital letters:

EACH UNDERSIGNED GUARANTOR ACKNOWLEDGES HAVING READ ALL THE PROVISIONS OF THIS GUARANTY AND AGREES TO ITS TERMS. IN ADDITION, EACH GUARANTOR UNDERSTANDS THAT THIS GUARANTY IS EFFECTIVE UPON GUARANTOR'S EXECUTION AND DELIVERY OF THIS GUARANTY TO LENDER AND THAT THE GUARANTY WILL CONTINUE UNTIL TERMINATED IN THE MANNER SET FORTH IN THE SECTION TITLED "DURATION OF GUARANTY". NO FORMAL ACCEPTANCE BY LENDER IS NECESSARY TO MAKE THIS GUARANTY EFFECTIVE. THIS GUARANTY IS DATED JULY 25, 2005.

CP 42, 45 (emphasis in original).

Given the facts and circumstances of this lawsuit, which arises from a $6,800,000 commercial loan secured on investment property as opposed to a consumer loan secured by the borrower's home, and applicable law, the trial court erred when it failed to enforce the waiver provisions in the Guaranties. As seen from the verbatim report of proceedings, at the summary judgment hearing, Mr. Reikow admitted to executing his Guaranty, and he acknowledged and agreed with the trial court's point that people who sign contracts could subsequently get out of them if they could simply claim they didn't know what they signed:

> THE COURT: You did sign it [the Guaranty], didn't you?
>
> MR. REIKOW: Well, I did sign it, but, you know, you sign them in the bank, you don't sign them in front of an escrow agent and you don't sign in front of an attorney, and I can't remember the bank even offering to – certainly, they didn't go over the papers with me. I guess when you're a contractor, you know, you assume the bank is your friend and kind of looking out for you, but that's certainly not the case. But you're right, I did sign it, but actually knowing what all that meant is foreign to me.
>
> THE COURT: And small print and all that, but if people would just say "I didn't understand what I signed," then that would be the end of any written contract, wouldn't it?
>
> MR. REIKOW: I agree.

VRP (Jan. 27, 2012) at 8.

Given this exchange, the verbiage of the Guaranties themselves, the facts and circumstances of this particular case, and controlling case

law like *Fruehauf*, the trial court erred when it refused to enter summary judgment against the Reikows based on the waivers in the Guaranties.

D. The Waivers In The Guaranties Are Not Contrary To Public Policy.

The waivers in the Guaranties are not contrary to public policy, and FCB is not asking this Court to conclude that waivers like the ones found in the Guaranties are enforceable in all cases in which the lender seeks the entry of a deficiency judgment against the guarantor of a commercial loan. As seen from FCB's Brief of Appellant at 20, FCB submits the trial court erred in this particular case when it refused to enter summary judgment in FCB's favor "on the fair value issue in light of these waivers *and the facts and circumstances set forth above*." (Emphasis added).

Again, this is not a case where the guarantors were able to explain at the summary judgment hearing or at trial why the bank's appraisal that was prepared and signed by three (3) licensed real estate appraisers did not accurately reflect the fair value of the collateral property. Nor is this a case where the guarantors submitted their own appraisal as to the fair value of the property at issue. FCB finds it noteworthy that the trial court did not take issue with FCB's appraisal at the summary judgment hearing, nor did it make any findings, conclusions, comments, or suggestions to the effect that this appraisal was not accurate and correct, and that a fair value hearing was therefore necessary or proper.

As such, in light of applicable law, and considering the facts and circumstances of this particular case, which concerns a large commercial loan made to a business as opposed to a consumer loan made to an unsophisticated individual, FCB maintains the waivers in the Guaranties are enforceable and are not contrary to public policy.

E. Enforcing The Waivers In This Case Would Not Create Inconsistency In Public Policy Or Deprive The Trial Courts Of Their Statutory Power To Conduct Fair Value Hearings *Sua Sponte.*

The Reikows are mistaken in their assertion that enforcing the waivers in the Guaranties in this case would create inconsistency in public policy. [9] Importantly, the enforcement of the waivers in the Guaranties in this case would not divest the trial courts of their statutory ability to conduct fair value hearings *sua sponte* under RCW 61.24.100(5).

To illustrate, assume a case in which an unscrupulous foreclosing lender that is nothing at all like FCB purchases the collateral property at the trustee's sale by way of a credit bid for mere pennies on the dollar. The unscrupulous lender subsequently files a deficiency action against the guarantor for the entire remaining debt and seeks to enforce waiver provisions in the guaranty to prevent the guarantor from requesting a fair value hearing in the hope of reducing or eliminating the deficiency claim. In such a case, even if the waivers in the guaranty were upheld and were not deemed to be substantively unconscionable, the trial court could still *sua sponte* order a fair value hearing to be held, regardless of anything the

[9] Brief of Respondents at 25-27.

guarantor or anyone else had to say about it. *See* RCW 61.24.100(5) ("the guarantor may request ... *or* the court or other appropriate adjudicator *may in its discretion* determine, the fair value of the property sold...") (Emphasis added). Under this scenario, public policy would not be offended because the relevant statute, RCW 61.24.100, would not be violated, and the unscrupulous lender's deficiency claim would still be subject to judicial oversight and possibly also a fair value hearing in the event the court took it upon itself to order one to be held.

Moreover, as indicated above, there is absolutely nothing to prevent the guarantor in the hypothetical case above from asserting it can request a fair value hearing despite any waiver provisions in the guaranty on the grounds that the denial of this request would be substantively unconscionable. Thus, upholding the waivers in the Guaranties in this case, a case in which the doctrine of unconscionability has, for good reason, never been raised, would not be offensive to public policy.

Again, this is a case in which (1) only one appraisal was before the trial court on summary judgment; (2) the scope of the waivers in the Guaranties is abundantly clear; (3) the Reikows never took issue with the appraisal's methodology; (4) the transcript of the summary judgment hearing reflects the trial court never took issue with the appraisal's methodology; and (5) the Reikows never were able to explain how or why the Narrows Business Park was actually worth something other than the as-is appraised amount of $6,630,000.

Given these circumstances, and in light of the applicable law concerning guaranties that is set forth in FCB's Brief of Appellant, the trial court should have enforced the waivers in the Guaranties by entering summary judgment against the Reikows on FCB's deficiency claim. A ruling in this regard would not be at all offensive to public policy. The reality is this case never should have gone to trial.

F. The Trial Court Committed Reversible Error By Concluding The Narrows Business Park's Fair Value Was $7,820,000 On The Date Of The Trustee's Sale.

Not surprisingly, the Reikows have devoted very little space in their Brief of Respondents to contend the trial court's post-trial fair value determination of $7,820,000 is actually within the range of the testimony at trial. [10] It is also not surprising that the Reikows make no mention in their brief of the fact that in addition to the evidence supplied by FCB's appraiser, Reid Erickson, and the appraisal that Mr. Erickson prepared and signed off on with two of his colleagues, FCB *also* submitted evidence of its own internal appraisal reviews that showed the Narrows Business Park was actually worth *less* than the appraised as-is value of $6,630,000. RP (Feb. 21, 2012) at 37-40. The Reikows would also have this Court ignore the fact that FCB paid $133,358.14 in delinquent property taxes that were owed on the Narrows Business Park at the time of the trustee's sale, which constitute "prior liens and encumbrances" that must be taken into account in making a fair value determination under RCW 61.24.005(6).

[10] The Reikows' argument on this topic begins on page 27 of their Brief of Respondents and concludes at the middle of page 29.

As seen from pages 26 and 27 of FCB's Brief of Appellant, when it comes to setting an upset price in a judicial foreclosure action in order to determine the amount of the deficiency judgment, numerous Washington cases hold the establishment of an upset price is not an abuse of discretion when it is within the range of the testimony at trial. *Nat'l Bank of Wash. v. Equity Investors*, 81 Wn.2d 886, 506 P.2d 20 (1973); *Farm Credit Bank of Spokane v. Tucker*, 62 Wn. App. 196, 206-7, 813 P.2d 619 (1991). FCB submits a fair value determination under the non-judicial foreclosure statute, RCW 61.24, must also be within the range of the testimony at trial in order to hold up on appeal.

"Testimony" has been defined as "Evidence that a competent witness under oath or affirmation gives at trial or in an affidavit or deposition." *Black's Law Dictionary* at 624 (Pocket ed. 1996).

Importantly, there was never any "testimony" at trial to the effect that the Narrows Business Park's fair value or fair market value was actually $7,820,000 on the date of the trustee's sale. *The Reikows themselves never actually testified they believed the Narrows Business Park was worth $7,820,000 on the date of the trustee's sale.* As seen from the Reikows' deposition testimony that was read into the record at trial, Mrs. Reikow admitted she had *no opinion* as to what the Narrows Business Park was worth on the date of the trustee's sale. RP (Feb. 21, 2012) at 63, line 23, 64. As for Mr. Reikow's testimony at trial, he never specifically testified that he believed the Narrows Business Park was

actually worth $7,820,000 on the date of the trustee's sale. RP (Feb. 21, 2012) at 65-73. Instead, the gist of Mr. Reikow's trial testimony / closing argument (which were to some extent intertwined, to put it mildly) was that FCB should be held to the erroneous fair market value figure in the Form 1099 as a matter of fairness to him, regardless of what this property was actually worth on the date in question.

In sum, as seen from the trial transcript and the findings of fact and conclusions of law, the sole basis for the trial court's fair value determination of $7,820,000 came from the Form 1099 that FCB sent to the Reikows' company, NBP, LLC, some seven (7) months after the trustee's sale and some three (3) months after FCB filed this deficiency action. *This fair value determination did not come from any witnesses who testified at trial under oath.* Again, no one ever "testified" that the $7,820,000 fair market value figure in the Form 1099 represents a true, correct, and accurate figure of what the Narrows Business Park's fair value or fair market value was as of the date of the trustee's sale. It is undisputed that FCB made a typographical error in the Form 1099, and that this form does not contain an accurate figure regarding the fair value or fair market value of the Narrows Business Park. As such, the trial court's fair value determination of $7,820,000 is not within the range of the testimony at trial and must therefore be set aside.

III. CONCLUSION

In light of applicable law and the record at hand, and considering the fact that no one ever testified at trial that the Narrows Business Park was actually worth $7,820,000, there is simply no way that the trial court's fair value determination of $7,820,000 can stand up on appeal. As such, FCB respectfully asks this Court to reverse the trial court's ruling and remand this case with instructions to the trial court to enter a deficiency judgment in favor of FCB against the Reikows in the principal amount of $672,068.88.

FCB arrived at this sum by taking the outstanding loan balance as of the date of the trustee's sale ($7,168,710.74) and subtracting from this sum the "fair value" of the Narrows Business Park on that date, which is $6,496,641.86. FCB arrived at this fair value figure by taking the appraised as-is fair market value of $6,630,000 and subtracting from this sum the $133,358.14 in delinquent property taxes that FCB paid.

RESPECTFULLY SUBMITTED this 27th day of August, 2012.

EISENHOWER CARLSON PLLC

By: _____

Alexander S. Kleinberg, WSBA # 34449
Chrystina R. Solum, WSBA # 41108
Joshua B. Lane, WSBA # 42192
Attorneys for Appellant First-Citizens Bank & Trust Company

I, Jennifer K. Fernando, am a legal assistant with the firm of Eisenhower & Carlson, PLLC, and am competent to be a witness herein. On August 27th, 2012, at Tacoma, Washington, I caused a true and correct copy of the Reply Brief of Appellant to be served upon the following in the manner indicated below:

Jeffrey Paul Helsdon, Esq. Oldfield & Helsdon, PLLC 1401 Regents Blvd., Suite 102 Fircrest, WA 98466	■ by Legal Messenger

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 27th day of August, 2012, at Tacoma, Washington.

Jennifer K. Fernando